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EXAMINER

CORBIN, ARTHUR L

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID G. BARKALOW,
MICHAEL A. REED,
ROBERT B. FRIEDMAN,
ELENA S. MIRZOEVA,
JULIUS W. ZUEHLKE and
ROBERT J. YATKA

Appeal 2008-1517
Application 10/617,905
Technology Center 1700

Decided: April 21, 2008

Before EDWARD C. KIMLIN, BARDLEY R. GARRIS, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-19. Claim 1 is
illustrative:

1. A method of forming a sugarless coating on chewing gum cores comprising:

- a) providing chewing gum cores;
- b) providing a coating syrup comprising one or more sugarless sweeteners;
- c) providing a dusting mix comprising about 20% to about 60% of a bulk sweetener selected from the group consisting of maltitol, hydrogenated isomaltulose, lactitol, sorbitol and mixtures thereof and about 40% to about 80% filler;
- d) applying a plurality of layers of the coating syrup and a plurality of layers of the dusting mix to the chewing gum cores to form a sugarless coating on the gum cores.

The Examiner relies upon the following references as evidence of obviousness:

Cherukuri ('510)	4,238,510	Dec. 9, 1980
Cherukuri ('838)	4,317,838	Mar. 2, 1982

Appellants' claimed invention is directed to a method of forming a sugarless coating on chewing gum cores. The method entails applying a plurality of layers of coating syrup and dusting mix to the cores. The syrup comprises one or more sugarless sweeteners and the dusting mix comprises a bulk sweetener and about 40% to about 80% filler. The filler may be calcium carbonate.

Appealed claims 1-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Cherukuri '838 or Cherukuri '510.

Appellants provide separate arguments for claims 3, 4, and 19, as a group, as well as claims 18 and 14. Accordingly, claims 1, 2, 5-13, and 15-17 stand or fall together.

We have thoroughly reviewed each of Appellants' arguments for patentability, as well as the Specification data relied upon in support thereof. However, we are in full agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection for the reason set forth in the Answer, which we incorporate herein, and we add the following for emphasis only.¹

There is no dispute that Cherukuri, like Appellants, discloses a method of forming a sugarless coating on chewing gum cores by applying a plurality of layers of coating syrup and dusting mix to the cores wherein the coating syrup comprises one or more sugarless sweeteners and the dusting mix comprises a bulk sweetener selected from Appellants' recited group and filler, such as calcium carbonate. As appreciated by the Examiner and stressed by Appellants, Cherukuri does not disclose the claimed amount of filler in the dusting mix, i.e., a minimum of about 40%. Cherukuri teaches that the filler may be about 20%, and that the dispersing agent, which may also be calcium carbonate, can be about 12%. Therefore, the combined amount of calcium carbonate in the dusting mix of Cherukuri may be about

¹ Since both of the applied references are essentially the same regarding the their pertinent disclosures, we will limit our discussion to Cherukuri '838.

32%. Hence, since the term "about" of the appealed claims, and the reference disclosure, permits some variance or tolerance, it can be seen that there is not a considerable difference between the claimed minimum amount of filler, about 40%, and the amount of calcium carbonate taught by the reference, about 32%.

A principal argument advanced by Appellants is that the prior art would have provided no suggestion of using more than about 32% of calcium carbonate, a claimed filler of Appellants. However, it is by now well settled that where patentability is predicated upon a change in a condition of a prior art composition, such as a change in concentration or the like, the burden is on the applicant to establish with objective evidence that the change is critical, i.e., it leads to a new, unexpected result. *In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Ranier*, 377 F.2d 1006, 1010 (CCPA 1967); *In re Bourden*, 240 F.2d 358, 361 (CCPA 1957); *In re Aller*, 220 F.2d 454, 456 (CCPA 1955). Hence, we agree with the Examiner that it would have been prima facie obvious for one of ordinary skill in the art to increase the amount of filler in the dusting mix of the reference in order to reduce the cost of preparing the sugarless coating on the gum, and the burden is properly upon Appellants to demonstrate with objective evidence that increasing the amount of filler in the dusting mix achieves a result that would have been truly unexpected by one of ordinary skill in the art. *In re Merck & Co.*, 800 F.2d 1091, 1099 (Fed. Cir. 1986); *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972).

Appellants rely upon Specification data as evidence of unexpected results. Examples 1 and 2 which are representative of the claimed invention contain 50% calcium carbonate, whereas Comparative Examples A and B contain no filler, i.e., 0% calcium carbonate. Appellants submit that the tests "show that the products made by the present invention unexpectedly have better properties than products made with no filler in the dusting mix" (Principal Br. 8, second para.). Appellants also contends that "the fact that products of the present invention were unexpectedly improved over products with no filler also shows that there is[sic, are] unexpected results compared to a hypothetical material having 20% filler in the dusting mix" (*id.*).

We, like the Examiner, find that Appellants' Specification data is not probative of nonobviousness for the claimed subject matter. It is fundamental in assessing the probative value of objective data offered to establish unexpected results that the data provide a comparison with the closest prior art. While Appellants argue that there is no requirement in the law that the comparison has to be with art cited in the Final Rejection, it remains incumbent upon an applicant to set forth a comparison with the closest prior art. *In re Johnson*, 747 F.2d 1456, 1461 (Fed. Cir. 1984). Although an applicant may demonstrate that other prior art is "closer" than the prior art applied by an Examiner, Appellants have not established on this record any prior art that is closer than Cherukuri. Manifestly, the comparative examples in Appellants' Specification, which contain 0 % filler, cannot reasonably be considered to be closer prior art than Cherukuri which discloses as much as about 32% calcium carbonate. Appellants have

proffered no evidentiary basis or rationale for their statement that the demonstrated improvement over a dusting mix comprising 0 % filler shows that there is an unexpected improvement over a mix comprising 20% filler. Indeed, it is questionable whether the improved results relative to a mix comprising no filler would have been considered truly unexpected by one of ordinary skill in the art.

As for the about 45% filler recited in claims 3, 4, and 19, and the claim 18 recitation of a particular property of the coated gum, our reasoning set forth above applies equally as well. Appellants have presented no objective evidence which demonstrates that the property recited in claim 18 is unexpectedly superior to the property possessed by the coated gums fairly taught by Cherukuri. Also, Appellants have not demonstrated unexpected results for the claim 14 recitation that over 80% of the solids in the syrup are maltitol.

In conclusion, based on the foregoing, it is our judgment that the evidence of obviousness presented by the Examiner outweighs the evidence of nonobviousness advanced by Appellants. Accordingly, the Examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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